# VIRGINIA LAW REGISTER

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**Law Reform.**

The students of Columbia University, New York, have been peculiarly fortunate during the last month in listening to the exceedingly entertaining and instructive lectures by Sir Frederick Pollock on The Genius of the Common Law. In one of these lectures he dwelt with much force upon the general complaint of lawyers against the Common Law and upon the various methods of reformation. He laid the main fault for the failure in sensible law reforms at the door of laymen and of great interests which oppose reform for their own personal advantage. He insisted that new methods in pleading were gained in spite of lay opposition and not by its aid, and that tinkering of unskilled legislatures had made the remedy worse than the disease.

"Even a tinker of genius cannot get beyond tinkering, and tinkers are not men of genius as a rule," was Sir Frederick's epigram for the unskillful legislator.

"Best of all ways of reform," he concluded, "is that the courts should never be wanting in the knowledge of their own inherent powers and the courage to use them. This achievement is of a felicity not reducible to classification or rule." * * *

"A remedial method, the most obvious and at first sight the most useful, is specific amendment by legislation, directed to particular defects as they are discovered or come to be more urgently felt. Without doubt this is a serviceable instrument when rightly handled, but in unskillful hands it can be a remedy worse than the disease. Until our time it was commonly considered as belonging to the technical part of the law and left to the leaders of the profession. It is much older than we commonly recognize.

"Much of the familiar everyday process in our courts of law rests on medieval statutes which not one modern lawyer in a hundred has ever looked at; all power to deal with costs, for example, is derived from statutes. The partial reforms in pleading, effected in the early part of the

eighteenth century and commemorated as we have already seen by Blackstone, are almost as little remembered at this day.

"Many provisions of this kind have become obsolete and are superseded by better or more comprehensive enactments. It is probable that some were never anything but mistakes, for good lawyers may fall into bad mistakes of policy. Some, it is certain, were mere failures, proving inoperative in practice from one or another unforeseen cause.

"At best there are points of inherent weakness in these occasional repairs. There is no security for any uniform plan being followed, or even for the workmen of today having any clear understanding of what those before him have done.

"The modern condition of legislative discussion has brought in the danger of amateur meddling and the not very desirable antidote of purposely framing technical amendments in the form least intelligible and most repulsive to the lay mind. Much has been said in the reproach of lawyers but there is more and worse to be said, if we choose to say it, against the man of business who thinks he knows better."

No greater evil can be imagined than the reformation of law at the hands of men unskilled in the science, and whilst we agree with Sir Frederick that the opposition to reform in pleading has too often come from great interests which saw the advantage they gained in cumbrous and antiquated methods, it has also come from lawyers who ought to know better. In this State of ours we have seen two very beneficent and long called for changes in our method of bringing actions defeated by a few skilled lawyers representing corporations. But on the other hand we have seen the lawyers themselves as an organized body either defeating or deferring action time and again upon any reform of our system of pleading falsely called "Common Law Pleading." For it has been so changed, modified and tinkered with—often for the best; sometimes for the worst—that it is an absurdity to call it "Common Law" any longer. "Uncommon Law" would be better.

At the first regular meeting after its organization, of the Virginia State Bar Association, held in July, 1889—twenty-two years ago—that great lawyer and jurist—himself one of the ablest

pleaders the Virginia Bar has ever known—Judge William J. Robertson, opened the meeting with his magnificent plea for a reform in our system of pleading. Each year thereafter suggestions for reform have been attempted and much care and thought given to efforts in that direction. These have met either with earnest and active opposition—sometimes with the sneer of witlings or oftener with cold indifference.

It is time *lawyers* should undertake this work, or else the tinkers of law will undertake it and the result will be confusion worse confounded.

Governor Wilson of New Jersey in his address before the Kentucky Bar Association has given utterance to words of wisdom the Bar of our State might well heed.

> "If the bar associations of this country were to devote themselves with the great knowledge and ability at their command, to the utter simplification of judicial procedure, to the abolition of technical difficulties and pitfalls, to the removal of every unnecessary form, to the absolute subordination of method to the object sought, they would do a great patriotic service which, if they will not address themselves to it, must be undertaken by laymen and novices. The actual miscarriages of justice, because of nothing more than a mere slip in a phrase or a mere error in an immaterial form, are nothing less than shocking. Their number is incalculable, but much more incalculable than their number is the damage they do to the reputation of the profession and to the majesty and integrity of the law. Any one bar association which would show the way to radical reform in these matters would insure a universal reconsideration of the matter from one end of the country to the other, and would by that means redeem the reputation of a great profession and set American society forward a whole generation in its struggle for an equitable adjustment of its difficulties."

Is it not indeed time that the Old Dominion, once the leader of this Nation in all things for civic advancement, should take the lead once more?

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The Court met on October 9th, Mr. Justice Day being absent. Since that date the venerable Justice Harlan has joined the silent

**The Pending Session of the Supreme Court of the United States.**

majority. Seldom in the history of the Court has there been a time when as many cases of widespread interest were before it. Of especial interest to Virginians is the case of Virginia *v.* West Virginia, in which the Attorney General of our State on the first day of the term made a motion to refer the case to a Master to settle the question of interest, the State of West Virginia having paid no attention to the suggestion of the Court as to an amicable adjustment of the matter between the two Commonwealths. West Virginia asked for thirty days in which to file an answer, but the Court only gave them twenty-four hours.

The Sherman Act will be before the Court in a number of cases, presenting various phases as to the enforcement of that law.

The "St. Louis Bridge Case" (U. S. *v.* Terminal Railroad Association) will have been argued and submitted by the time this number of the REGISTER reaches its readers, the judgment of the lower court dismissing the bill having been set down for review and argument on October 10th. The "Hard Coal Case" (U. S. *v.* Reading Company, etc.) in which the Government charges certain railroads and coal companies with being parties to a combination and conspiracy to end competition among themselves in the transportation and sale of anthracite coal and to prevent the sale of the independent output in competition with their own will also be heard: The Government lost its case in the lower court except as to the Temple Iron Company, against whom an injunction was granted and this Company taking an appeal. In U. S. *v.* Patten, etc.—the "Cotton Case"—the Government alleges that an attempt was made to monopolize interstate trade and commerce in available cotton by acquiring enough of that commodity on the New York Cotton Exchange to give the alleged violators of the law the power to fix excessive and arbitrary prices. Nash *v.* U. S. (the "Turpentine Case") in which the head officials of the American Naval Stores Company were indicted and convicted—they appealing—has not been advanced on the docket and will hardly be reached this term.

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Mr. Justice Story—whose great work on the Constitution has

**The Charter of the Northwest Territory.**

probably led more men into error and given rise to more political heresy than any work ever written—would we imagine have a distinct shock if he could read the opinion of the Supreme Court of Ohio in State *v.* Boone, O. L. R. Supp. IX 195. Justice Story had a pet idea, reiterated by men of his school, that the sovereignty of the crown of Great Britain passed to the *people* of *all* the colonies. Professor Tucker in his lectures on Constitutional Law, of which unfortunately but few copies exist, absolutely destroyed this view by showing that Story's authority, Chief Justice Jay, admitted there were *thirteen sovereigns* emerging from the principles of the Revolution, who were combined by local convenience and considerations. Combined as *states, as sovereign states,* who appointed delegates, who voted by *states,* the smallest having equal weight with the largest—an attribute of sovereign equality which is yet retained in the Senate of the United States. One of the sovereigns was Virginia, then an empire stretching over Kentucky, Ohio, Indiana, Illinois and Michigan. When, to mould into shape a more perfect union the Old Dominion threw into the melting pot, as carelessly as Cleopatra dissolved her pearl, and as nobly as ever since that time she has sacrificed alike land and children to her country, the great Northwest Territory, the Congress passed an ordinance providing for the government of this Territory. And that ordinance has slumbered in the lumber-room for more than a century with occasional mutterings (5 Ohio 410 and 9 Ohio 52) until a physician resurrected it and the Ohio Supreme Court pronounced it very much alive. It appears that by an act of the Ohio Legislature medical examiners all over the state were required to report upon all births and deaths without compensation. A physician was indicted for failure to make such reports and the Supreme Court discharged him, basing in the main part its judgment upon the old charter, which it pronounced a *"Compact or Treaty"* binding all of the *States,* and that charter providing that "should the public exigencies make it necessary for the common preservation to take any person's property or to *demand his* particular services, full compensation shall be made for the same." This "compact or treaty" can only be revoked, the court says by the consent of all parties "and

revocation or amendment must proceed by act of Congress *representing the states* which created the territorial government and through subsequent revocation by the people of the six states made up of the old Northwest Territory."

We cannot forbear quoting the language of the Court:

"If our Constitution, instead of creating a republican form of government for the State, had provided a pure democracy, a government directly by the people, and, so framed, it had been accepted by the President and Congress of the United States, there might have been *some* reason for the claim that, in that respect, the compact which was to 'remain forever unaltered, unless by common consent' had been repealed by implication; yet even under such circumstances a conclusive presumption would not be raised that the compact had been altered, without the common consent of all the parties thereto. But if the convention which prepared our Constitution had omitted from the Bill of Rights the famous interdiction against slavery, contained in Article VI of the ordinance, would that have justified the conclusion that the compact was altered and that the existence of slavery in Ohio would be constitutional? Or, to put the question in another form, if our Constitution contained nothing whatever in regard to the privilege of the writ of *habeas corpus,* or to trial by jury, or to proportional representation of the people in the Legislature, or to the prohibition of cruel and unusual punishments, it could not be justly inferred that the great compact had been altered and that these privileges and guaranties had been subtracted from the rights of the citizens, and were not included in the rights reserved by the people (Const. of Ohio, Art. I, Sec. 20); because there would have been nothing in the Constitution which was inconsistent with the ordinance and the declared purpose thereof "to fix and establish those principles as the basis of all laws, constitutions and governments, which forever hereafter shall be formed in said territory," and that these 'articles shall be considered as articles of compact between the *original states,* and the *people* and *states* in said territory, and forever remain unalterable, unless by common consent.'

"In Hogg *v.* Manufacturing Co., 5 Ohio Rep. 410, at page 416, Hitchcock, J., speaking of a clause in Article IV of the ordinance, said:

" 'This portion of the Ordinance of 1787, is as much obligatory upon the State of Ohio as our own Constitution. In truth it is more so; for the Constitution may be altered by the people of the State, while this cannot be altered with-

out the assent both of the people of this state and of the United States through their representatives. It is an article of compact, and until we assume the principle that the sovereign power of the state is not bound by a contract, this clause must be considered obligatory.'

"And in Hutchinson *v.* Thompson, 9 Ohio R. 52, at page 62, Grinke, J., remarked:

" 'But when application for admission into the Union was made by the people inhabiting the eastern part of the territory, modifications in several parts of the ordinance were asked for, and they were granted by the United States as one party, to the state as the other. This seems to show that the people of Ohio have, so far, treated the articles of compact as of perpetual obligation. The alterations proposed were with a view to the immediate formation of a state Constitution, and were of no importance if the states should have a right to annul the ordinance the moment it assumed that condition.'

"Similar language is found in the opinion in Cochran's Heirs *v.* Loving (17 Ohio R. 409, 424-425, and the foregoing quotations remain as the unmodified expressions of this court upon this subject.

"We are not unaware of various *dicta* which have appeared from time to time in opinions by learned justices of the Supreme Court of the United States, beginning with Pollard's Lessee *v.* Hagan, 3 How. 212, and Permoli *v.* Municipality, 3 How. 589, 616; Strader *v.* Graham, 10 How. 82. But it requires no acute analysis to differentiate those cases and to show that they do not go very thoroughly into the question whether the Ordinance of 1787 can be superseded otherwise than by the 'common consent' of the parties to the compact as required by the terms of the ordinance, or whether such 'common consent' ever has been given; and, giving the fullest effect that can be claimed from those remarks by the distinguished judges, it is obvious that they ignore the distinction between a mere act of Congress which may be repealed or superseded by subsequent acts, and a solemn and formal 'compact' in the nature of a treaty, as it were, between the proprietary states and the people and states of the territory which was subsequently to be erected into several states of this Union. They ignore, moreover, the fact that the compact, on the good faith of which the original proprietors ceded this territory to the United States, expressly declared that the principles declared therein shall be the basis of 'all laws, constitutions and governments which forever hereafter shall be formed in the said territory;' and

> at best these declarations rest on no stronger foundation than the provision of the compact itself, namely that a state with constitutional limitations as provided, 'shall be admitted, *by its delegates,* into the *Congress* of the United States, on *an equal footing,* with the original states, *in all respects* whatever.' See cases above cited and Escanaba Co. *v.* Chicago, 107 U. S. 678, 688-689; Van Brocklin *v.* Tennessee, 117 U. S. 151, 159; Sands *v.* Manistee River Improvement Co., 123 U. S. 288, 295-296; Williamette Iron Bridge Co. *v.* Hatch, 125 U. S. 1, 9-10. Whatever that clause may mean, it certainly does not mean that all state constitutions shall be, or are, alike, nor that a new state erected in the Northwest Territory, shall be understood to surrender all the guaranties of the compact as a condition of admission as a state."

This is curious language coming from Ohio, but mighty good, sound, oldtime States Rights doctrine. If the "people" were sovereigns over all the United States in 1787 there could have been no necessity for a "compact or treaty" between the states as to a matter of this kind, and the people of the states voting carved out of that territory by a majority vote en masse could annul it.

But the Court says the contrary—the States in their sovereign capacity must vote as States on the question and the other States, although their creators, must in Congress assembled, repeal the treaty they had made between themselves, called the Northwest Charter, which by the way we believe was drafted by Thomas Jefferson.

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**The English Court of Appeal.**

Our English brethren are finding that their Court of Criminal Appeal is a tribunal which does not feel itself hampered by precedent and whose chief aim is to prevent miscarriage of justice, whether by political error or the verdict of juries. It has expressed itself as very loth to interfere with the verdict of a jury, but it is after exact justice and will have nothing else. In the two cases of Rex *v.* Schrager and Rex *v.* Dollery they quashed conviction in the one case because they thought there was not sufficient evidence of identification; in the other the Judge had directed the jury to bring in a ver-

dict of "Not guilty," but with characteristic English obstinacy they declined to do so and found him guilty, and even after the Judge had refused to accept that verdict, they refused to change it.

In Rex *v.* Machardy the defendant was found guilty of arson, but insane, though there was no evidence of his insanity at the time of the crime. The Appellate Court were not clear that the sentence of detention which followed could be upheld.

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**Insanity as a Defence.**

The air and the newspapers have in the last few months been full of questions of insanity, both of criminal and non-criminal persons. A peculiarly horrid and shocking crime in an adjacent county will probably go unwhipped of justice on account of the insanity of the unfortunate man who committed it, and the question is constantly asked, What should be done with the insane man who commits a crime? Our Virginia Legislature has settled it in Section 1682 of Pollard's Code which provides for the detention of the criminally insane at a proper hospital, and which is probably about as humane a law as could be devised. That insanity as a defence is often an excuse unjustified by the facts is no doubt true, and that a great many criminals have been acquitted upon the ground of insanity who ought to have been punished, is without doubt.

The State of Washington has attempted to cure the frequent pleas of insanity by criminals by providing that "It should be no defence to a person charged with the commission of crime that at the time of its commission he was unable by reason or his insanity, idiocy or imbecility to comprehend the nature and quality of the act committed, or to understand that it was wrong; or that he was afflicted with a morbid propensity to commit prohibited acts, nor shall any testimony or other proof thereof be admitted in evidence." This attempt to cut the Gordian knot, however, was defeated by the case of the State of Washington *v.* Martin Strasburg, 110 Pac. 1021, 32 L. R. A., N. S., 1216, in which the Supreme Court of that State held that the Legislature had no power under the Constitution to enact a law taking away

from a defendant accused of crime the opportunity to show in his defence the fact that at the time of the commission of the act charged as a crime against him he was insane and by reason thereof was unable to comprehend the nature and quality of the act committed. And Parker, Justice, in a very learned and able opinion citing multitudinous authority, held that the act was unconstitutional; that there could be no crime without a criminal intent, and that a person was deprived of his constitutional rights by the act which forbade him to submit to the jury the question of whether or not he was insane. The State sought to uphold the act on the ground that it was within the police power of the State to eliminate the question of intent in all criminal cases; as well as on the ground that under modern theories the law breaker is taken into custody by the state for his own amelioration and reform and not as a punishment for crime. The Washington act went on to provide that after the conviction of an insane person he should be taken into custody as insane, but the Washington court held that this deprived the accused of the constitutional guarantee that he had a right to appear and defend in person, to be informed of the nature and cause of the accusation against him, to meet the witnesses, etc., that being insane he could not avail himself of these guarantees.

The act of the Legislature of North Carolina in 1899 provided that no person acquitted of a capital felony on the ground of insanity and committed to the hospital for dangerous insane shall be discharged therefrom unless an act authorizing his discharge be passed by the General Assembly. This act was declared unconstitutional In re Boyett, 136 N. C. 415.

In 1873 the Legislature of Michigan passed an act providing that any person acquitted of murder and other high crimes by reason of insanity should be sentenced to confinement in the insane hospital of the state prison, and that such person could only be discharged therefrom by the Governor upon a certificate of the medical inspector of the insane asylum, and the Circuit Judge of the Circuit from which he was sent that he was no longer insane. This act was also declared unconstitutional in Underwood *v.* The People, 32 Mich. 1, on the ground that it denied to the accused the protection of the Due Process clause

of the Constitution. The opinion in this latter case was delivered by Judge Campbell and concurred in by Justice Cooley, and Chief Justice Graves. In the case under discussion Judge Morris of the Supreme Court of Washington, concurred in the result but dissented from the opinion, holding that the fact of insanity being determined by a jury, then the Court had a right to pronounce such judgment as the Legislature in its wisdom might determine. Judge Fullerton dissented *in toto*.

The question is an exceedingly interesting one and might lead to a careful scrutiny of our own act which as yet has not passed the scrutiny of the courts as to its Constitutionality.

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**The Reorganization of the Federal Judicial System.**

On January 1st, 1912 the entire Federal Judicial System is reorganized; the Judiciary Act of March 3rd, 1911, going into effect on that day. This act incorporates into one statute all the acts of Congress creating Federal Courts and defining their jurisdiction, as well as many of the statutes regulating procedure in these courts. The Circuit Courts are abolished and a very large part of the jurisdiction now belonging to those court is transferred to the District Courts.

The minimum jurisdictional amount in suits arising under the Constitution and laws or treaties of the United States, or between citizens of different states, or between citizens of a state and foreign states, citizens or subjects, is now three thousand dollars in the new District Courts, instead of two thousand dollars, as it was in the old Circuit Courts.

The jurisdiction of the Circuit Courts of Appeal remains practically unchanged, as does that of the Supreme Court, except of course in so far as change in the jurisdiction and powers of the District Courts and other special courts require resultant changes in these courts.

Exclusive jurisdiction is given the Federal Courts as follows:

> "Sec. 256. The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states:

"First. Of all crimes and offenses cognizable under the authority of the United States.

"Second. Of all suits for penalties and forfeitures incurred under the laws of the United States.

"Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.

"Fourth. Of all seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

"Fifth. Of all cases arising under the patent-right, or copy-right laws of the United States.

"Sixth. Of all matters and proceedings in bankruptcy.

"Seventh. Of all controversies of a civil nature, where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens.

"Eighth. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice-consuls."

The profession will await with much interest the report of the committee on reformation, changes, etc., in the rules of procedure in the Federal Courts.

Mr. Justice Lurton spent some time this summer in Great Britain investigating methods of procedure in the courts of that kingdom. It is to be hoped that a simple, clear and rational set of rules may be the result of the Committee's efforts and that these rules may be such that the State Courts will find in them a basis for a uniform and reformed code of practice.